No. 330

SUPREME COURT OF THE UNITED STATES

October Term, 1950

AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, DIVISION 998, GEORGE KOECHEL and CHARLES BREHM, Individually and in Their Representative Capacity,

Petitioners,

v.

WISCONSIN EMPLOYMENT RELATIONS BOARD, L. E. GOODING, HENRY RULE and J. E. FITZGIBBON, Individually and as Members of the Wisconsin Employment Relations Board; CARL LUDWIG, H. HERMAN RAUCH and MARTIN KLOTSCHE, Individually and as Members of a Board of Arbitration, and THE MILWAUKEE ELECTRIC RAILWAY & TRANSPORT COMPANY, a Wisconsin Corporation,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE WISCONSIN SUPREME COURT

BRIEF OF RESPONDENTS' WISCONSIN EMPLOYMENT RELATIONS BOARD, L. E. GOODING, HENRY RULE and J. E. FITZGIBBON, Individually and as Members of the Wisconsin Employment Relations Board IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INDEX

CASES

STATUTES INVOLVED

Federal Statutes

Wisconsin Statutes for 1949

CONSTITUTIONAL PROVISIONS

U. S. Constitution

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OPINIONS BELOW

The opinion of the Circuit Court for Milwaukee County (R. 101-106) is unreported. The opinion of the Wisconsin Supreme Court (R. 235-237) is reported in 257 Wis. 53, 42 N. W. (2) 477.

JURISDICTION

The jurisdiction of this Court is invoked under Section 1257 (3) of Title 28, U. S. C.

QUESTION PRESENTED

May a state, in the exercise of its police power, substitute compulsory arbitration for a strike in a labor dispute between a union and a public utility supplying an essential public utility service where

(1) the utility's operations are local in character and do not involve the "national health or safety" so as to invoke the "emergency" provision of the Taft-Hartley Act (29 U. S. C. Supp. § 180) and where

(2) pursuant to statute a court of competent jurisdiction has found that a work stoppage by the union in the supply of such essential public utility service will create an emergency resulting in irreparable injury to the citizens of such state.

STATE AND FEDERAL STATUTES INVOLVED

The pertinent state statutes, sections 111.50 to 111.65, Subchapter III of Chapter 111 of the Wisconsin Statutes for 1949, are printed in the appendix.

The pertinent federal statute is the Labor Management Relations Act of 1947, 61 Stat. 136, 29 U. S. C. §§ 141 to 197.

STATEMENT

The arbitrators made and filed their award on April 11, 1949, pursuant to the provisions of Section 111.59 of Wisconsin Statutes of 1949. Under the statute, the award "shall continue effective for one year from that date".

ARGUMENT

I.

Petitioner Contends that Subchapter III of Chapter 111 of the Employment Peace Act is Repugnant to the National Labor Relations Act as amended in that it is Contrary to Article I, Section 8 and Article VI of the Federal Constitution.

This is unsound for the two following reasons:

(a) Congress has not protected the union conduct which Wisconsin has forbidden.

That Congress has concurred in the view that neither Section 7 of Taft-Hartley (29 U. S. C. A. § 157), nor Section 13 (29 U. S. C. A. § 163), confer absolute right to strike does not rest on mere inference. The opinion in *International Union, U. A. W., A. F. of L., Local 232 et al., v. Wisconsin Employment Relations Board et al.*, (1949) 336 U. S. 245, 69 S. Ct. 516, reviews the recommendation of the House Committee of Conference (handling the bill which became the Labor Management Relations Act) that the House recede from its position of enumerating exceptions to the protection of Section 7 (29 U. S. C. A. § 157)

because of real concern that the inclusion of such enumerated exceptions would have a limiting effect and draw within the protection of Section 7 a variety of improper conduct not specifically mentioned.

Petitioner's contentions in its brief are couched in the general phrases "the superior jurisdiction" of the Federal Labor Board, at page 18, or "the entire policy" of the federal act, at page 19, or a "national policy in labor management relations", at page 18.

In substance, petitioner's contentions are those set forth in the dissenting opinion of Mr. Justice Douglas, in the *Wisconsin Auto Workers case*, supra. If we understand the dissenting opinion correctly, it contends the decision in *Hill v. Florida*, (1945) 325 U. S. 538, 65 S. Ct. 1373, 89 L. ed. 1782, ought to have been controlling in the *Wisconsin Auto Workers case*. The complete answer to petitioner's contention is found in the dissenting opinion in *Hill v. Florida*, supra, and, of course, in the majority opinion in the *Wisconsin Auto Workers case*.

We do find, however, reliance by petitioner specifically upon several sections of the Federal Act. At pages 13 and 14 of its brief, it contends Wisconsin, in insuring continuity of essential service in local public utilities, is obstructing interstate commerce, contrary to Section 7 of the Federal Act. This contention ignores the thorough examination of Section 7 in the *Wisconsin Auto Workers case*, supra.

Further, at pages 18 to 20, petitioner contends, presumably, that Section 10 (a) grants to the Federal Board, an "exclusive jurisdiction" (p. 18) to determine whether a party is bargaining in good faith under Section 8 (a) (5). This contention ignores the thorough examination of this issue in *Algoma Plywood Co. v. Wis. Board*, (1949) 336 U. S. 301, 69 S. Ct. 584, where this court said:

[336 U. S, 305]

> "In seeking to show that the Wisconsin Board had no power to make the contested orders, petitioner points first to § 10 (a) of the National Labor Relations Act, which is set forth in the margin. It argues that the grant to the National Labor Relations Board of 'exclusive' power to prevent 'any unfair labor practice' thereby displaced State power to deal with such practices, provided of course that the practice was one affecting commerce. But this argument implies two equally untenable assumptions. One requires disregard of the parenthetical phrase '(listed in section 8)'; the other depends upon attaching to the section as it stands, the clause 'and no other agency shall have power to prevent unfair labor practices not listed in section 8.'"

We note the word "exclusive" is used advisedly in the *Algoma* decision, because Congress carefully omitted it from the amended act. The footnote reference to section 10 (a) at page 305, 336 U. S., is to the original act, not to the act as amended by the Labor-Management Relations Act of 1947.

Petitioner contends, at page 19 of its brief, that Wisconsin, in providing at sec. 111.58 of its state statute, Wis. Stats. 1949:

> "The arbitrator shall not make any award which would infringe upon the right of the employer to manage his business or which would interfere with the internal affairs of the union."

has removed from the area of relief which can be granted an appropriate subject of collective bargaining. This *exercise* by the arbitrator of its power not to grant relief, if relief sought was proper, is subject to review under the Wisconsin Act at section 111.60 thereof.

No attempt was made by Section 13 (29 U. S. C. A. § 163), of the Federal Act to regulate what other Acts or other State laws might do. Not even if we use such general terms as "policy of the act" or "scope of the act", and ignore its precise terms, can conflict and repugnancy be found. And this is because there is no available regulation by the Federal Board within the rule announced in *Allen-Bradley Local No. 1111, United Electrical, Radio & Machine Workers of America, et al., v. Wisconsin Employment Relations Board,* (1942) 315 U. S. 740, 749, 62 S. Ct. 820, 86 L. ed. 1154. In *U. A. A. and A. I. W. of A., C. I. O. v. O'Brien,* (1950) 70 S. Ct. 781, 94 L. ed. 659, it became apparent that Congress had made available to the Federal Labor Board the precise authority to determine the collective bargaining unit, a ministerial function, but, as established, a unit which Michigan found it could not disregard. Section 9 (29 U. S. C. A. § 159). See *UAW-CIO v. O'Brien,* supra.

(b) In crisis labor situations, under Title II of the Federal Law, Congress has not acted.

This has been briefed in the companion case, #329.

II.

Petitioner contends the Wisconsin Law Violates the Federal Fourteenth Amendment.

This has been briefed in the companion case, # 329.

III.

The Writ Should be Denied Because the Question is Moot.

The award of the arbitration board was made and filed with the clerk of the Circuit Court for Milwaukee County on April 11, 1949. In view of the statutory provision that the effective period of the award shall be limited to one year, the petitioner really has no unsettled issue pending.

CONCLUSION

The decision below is correct and there is no conflict of decisions or a material constitutional question. We respectfully submit that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

Wisconsin Statutes

SUBCHAPTER III.

Public Utilities.

111.50 DECLARATION OF POLICY. It is hereby declared to be the public policy of this state that it is necessary and essential in the public interest to facilitate the prompt, peaceful and just settlement of labor disputes between public utility employers and their employes which cause or threaten to cause an interruption in the supply of an essential public utility service to the citizens of this state and to that end to encourage the making and maintaining of agreements concerning wages, hours and other conditions of employment through collective bargaining between public utility employers and their employes, and to provide settlement procedures for labor disputes between public utility employers and their employes in cases where the collective bargaining process has reached an impasse and stalemate and as a result thereof the parties are unable to effect such settlement and which labor disputes, if not settled, are likely to cause interruption of the supply of an essential public utility service. The interruption of public utility service results in damage and injury to the public wholly apart from the effect upon the parties immediately concerned and creates an emergency justifying action which adequately protects the general welfare.

111.51 DEFINITIONS. When used in this subchapter:

(1) "Public utility employer" means any employer (other than the state or any political subdivision thereof) engaged in the business of furnishing water, light, heat, gas, electric power, public passenger transportation or communication, or any one or more of them, to the public in this state; *and shall be deemed to include a rural electrification co-operative association engaged in the business of furnishing any one or more of such services or utilities to its members in this state. Nothing in this subsection shall be interpreted or construed to mean that rural electrification co-operative associations are hereby brought under or made subject to chapter 196 or other laws creating, governing or controlling public utilities, it being the intent of the legislature to specifically exclude rural electrification co-operative associations from the provisions of such laws.* This subchapter does not apply to railroads nor railroad employes. (Italicized matter added by Ch. 37, Laws of 1949)

(2) "Essential service" means furnishing water, light, heat, gas electric power, public passenger transportation or communication, or any one or more of them, to the public in this state.

(3) "Collective bargaining" means collective bargaining of or similar to the kind provided for by subchapter I of this chapter.

(4) "Board" means the Wisconsin employment relations board.

(5) "Arbitrators" refers to the arbitrators provided for in this subchapter.

111.52 SETTLEMENT OF LABOR DISPUTES THROUGH COLLECTIVE BARGAINING AND ARBITRATION. It shall be the duty of public utility employers and their employes in public utility operations to exert every reasonable effort to settle labor disputes by the making of agreements through collective bargaining between the parties, and by maintaining the agreements when made, and to prevent, if possible, the collective bargaining process from reaching a state of impasse and stalemate.

111.53 APPOINTMENT OF CONCILIATORS AND ARBITRATORS. Within 30 days after this subchapter becomes effective, the board shall appoint a panel of persons to serve as conciliators or arbitrators under the provisions of this subchapter. No person shall serve as a conciliator and arbitrator in the same dispute. Each person appointed to said panels shall be a resident of this state, possessing in the judgment of the board, the requisite experience and judgment to qualify such person capably and fairly to deal with labor dispute problems. All such appointments shall be made without a consideration of the political affiliations of the appointee. Each appointee shall take an oath to perform honestly and to the best of his ability the duties of conciliator or arbitrator, as the case may be. Any appointee may be removed by the board at any time or may resign his position at any time by notice in writing to the board. Any vacancy in the panels shall be filled by the board within 30 days after such vacancy occurs. Such conciliators and arbitrators shall be paid reasonable compensation for services and for necessary expenses, in an amount to be fixed by the board, such compensation and expenses to be paid out of the appropriation made to the

board by section 20.585 upon such authorizations as the board may prescribe.

111.54 CONCILIATION. If in any case of a labor dispute between a public utility employer and its employes, the collective bargaining process reaches an impasse and stalemate, with the result that the employer and the employes are unable to effect a settlement thereof, then either party to the dispute may petition the board to appoint a conciliator from the panel, provided for by section 111.53. Upon the filing of such petition, the board shall consider the same, and if in its opinion, the collective bargaining process, notwithstanding good faith efforts on the part of both sides to such dispute, has reached an impasse and stalemate and such dispute, if not settled, will cause or is likely to cause the interruption of an essential service, the board shall appoint a conciliator from the panel to attempt to effect the settlement of such dispute. The conciliator so named shall expeditiously meet with the disputing parties and shall exert every reasonable effort to effect a prompt settlement of the dispute.

111.55 CONCILIATOR UNABLE TO EFFECT SETTLEMENT; APPOINTMENT OF ARBITRATORS. If the conciliator so named is unable to effect settlement, of such dispute within a 15-day period after his appointment, he shall report such fact to the board; and the board, if it believes that a continuation of the dispute will cause or is likely to cause the interruption of an essential service, shall submit to the parties the names of either 3 or 5 persons from the panel provided for in section 111.53. Each party shall alternately strike one name from such list of persons. The person or persons left on the list shall be appointed by the board as

the arbitrator (or arbitrators) to hear and determine such dispute.

111.56 STATUS QUO TO BE MAINTAINED. During the pendency of proceedings under this subchapter existing wages, hours, and conditions of employment shall not be changed by action of either party without the consent of the other.

111.57 ARBITRATOR TO HOLD HEARINGS. (1) The arbitrator shall promptly hold hearings and shall have the power to administer oaths and compel the attendance of witnesses and the furnishing by the parties of such information as may be necessary to a determination of the issue or issues in disputes. Both parties to the dispute shall have the opportunity to be present at the hearing, both personally and by counsel, and to present such oral and documentary evidence as the arbitrator shall deem relevant to the issue or issues in controversy.

(2) It shall be the duty of the arbitrator to make written findings of fact, and to promulgate a written decision and order, upon the issue or issues presented in each case. In making such findings the arbitrator shall consider only the evidence in the record. When a valid contract is in effect defining the rights, duties and liabilities of the parties with respect to any matter in dispute, the arbitrators shall have power only to determine the proper interpretation and application of contract provisions which are involved.

(3) Where there is no contract between the parties, or where there is a contract but the parties have begun negotiations looking to a new contract or amendment of the

existing contract, and wage rates or other conditions of employment under the proposed new or amended contract are in dispute, the factors, among others, to be given weight by the arbitrator in arriving at decision, shall include:

(a) Comparison of wage rates or other conditions of employment of the utility in question with prevailing wage rates or other conditions of employment in the local operating area involved;

(b) Comparison of wage rates or other working conditions with wage rates or other working conditions maintained for the same or similar work of workers exhibiting like or similar skills under the same or similar working conditions in the local operating area involved;

(c) The value of the service to the consumer in the local operating area involved;

(d) Where a public utility employer has more than one plant or office and some or all of such plurality of plants or offices are found by the arbitrator to be located in separate areas with different characteristics, consideration shall be given to the establishment of separate wage rates or schedule of wage rates and separate conditions of employment for plants and offices in different areas;

(e) The overall compensation presently received by the employes having regard not only to wages for time actually worked but also to wages for time not worked, including (without limiting the generality of the foregoing) vacation, holidays, and other excused time, and all benefits received, including insurance and pensions, medical and hospitalization benefits and the continuity and stability of employment enjoyed by the employes. The foregoing

enumeration of factors shall not be construed as precluding the arbitrator from taking into consideration other factors not confined to the local labor market area which are normally or traditionally taken into consideration in the determination of wages, hours and working conditions through voluntary collective bargaining or arbitration between the parties.

111.58 STANDARDS FOR ARBITRATION. The arbitrator shall not make any award which would infringe upon the right of the employer to manage his business or which would interfere with the internal affairs of the union.

111.59 FILING OF ORDER WITH CLERK OF CIRCUIT COURT; PERIOD EFFECTIVE; RETROACTIVITY. The arbitrator shall hand down his findings, decision and order (hereinafter referred to as the order) within 30 days after his appointment; except that the parties may agree to extend, or the board may for good cause extend the period for not to exceed an additional 30 days. If the arbitrators do not agree, then the decision of the majority shall constitute the order in the case. The arbitrator shall furnish to each of the parties and to the public service commission a copy of the order. A certified copy thereof shall be filed in the office of the clerk of the circuit *court* of the county wherein the dispute arose or where the majority of the employes involved in the dispute reside. Unless such order is reversed upon a petition for review filed pursuant to the provisions of section 111.60, such order, together with such agreements as the parties may themselves have reached, shall become binding upon, and shall control the relationship between the parties from the date such order is filed with the clerk of the circuit court, as aforesaid, and shall

continue effective for one year from the date, but such order may be changed by mutual consent or agreement of the parties. No order of the arbitrators relating to wages or rates of pay shall be retroactive to a date before the date of the termination of any contract which may have existed between the parties, or, if there was no such contract, to a date before the day on which the demands involved in the dispute were presented to the other party. The question whether or not new contract provisions or amendments to an existing contract are retroactive to the terminating date of a present contract, amendments or part thereof, shall be matter for collective bargaining or decision by the arbitrator. (Italicized matter added by Ch. 634, Sec. 16, Laws 1949)

111.60 JUDICIAL REVIEW OF ORDER OF ARBITRATOR. Either party to the dispute may within 15 days from the date such order is filed with the clerk of the court, petition the court for a review of such order on the ground (1) that the parties were not given reasonable opportunity to be heard, or (2) that the arbitrator exceeded his powers, or (3) that the order is not supported by the evidence, or (4) that the order was procured by fraud, collusion, or other unlawful means. A summons to the other party to the dispute shall be issued as provided by law in other civil cases; and either party shall have the same rights to a change of venue from the county, or to a change of judge, as provided by law in other civil cases. The judge of the circuit court shall review the order solely upon the grounds for review herein above set forth and shall affirm, reverse, modify or remand such order to the abitrator as to any issue or issues for such further action as the circumstances require.

111.61 BOARD TO ESTABLISH RULES. The board shall establish appropriate rules and regulations to govern the conduct of conciliation and arbitration proceedings under this subchapter.

111.62 STRIKES, WORK STOPPAGES, SLOWDOWNS, LOCKOUTS, UNLAWFUL; PENALTY. It shall be unlawful for any group of employes of a public utility employer acting in concert to call a strike or to go out on strike, or to cause any work stoppage or slowdown which would cause an interruption of an essential service; it also shall be unlawful for any public utility employer to lock out his employes when such action would cause an interruption of essential service; and it shall be unlawful for any person or persons to instigate, to induce, to conspire with, or to encourage any other person or persons to engage in any strike or lockout or slowdown or work stoppage which would cause an interruption of an essential service. Any violation of this section by any member of a group of employes acting in concert or by any employer or by any officer of an employer acting for such employer, or by any other individual, shall constitute a misdemeanor.

111.63 ENFORCEMENT. The board shall have the responsibility for enforcement of compliance with the provisions of this subchapter and to that end may file an action in the circuit court of the county in which any such violation occurs to restrain and enjoin such violation and to compel the performance of the duties imposed by this subchapter. In any such action the provisions of sections 103.51 to 103.63 shall not apply.

111.64 CONSTRUCTION. (a) Nothing in this subchapter shall be construed to require any individual employe to

render labor or service without his consent, or to make illegal the quitting of his labor or service or the withdrawal from his place of employment unless done in concert or agreement with others. No court shall have power to issue any process to compel an individual employe to render labor or service or to remain at his place of employment without his consent. It is the intent of this subchapter only to forbid employes of a public utility employer to engage in a strike or to engage in a work slowdown or stoppage in concert, and to forbid a public utility employer to lock out his employes, where such acts would cause an interruption of essential service.

(b) All laws and parts of laws in conflict herewith are to the extent of such conflict concerning the subject matter dealt with in this subchapter, supplanted by the provisions of this subchapter.

111.65 SEPARABILITY. It is hereby declared to be the legislative intent that if any provision of this subchapter, or the application thereof to any person or circumstance is held invalid, the remainder of the subchapter and the application of such provisions to persons or circumstances other than those as to which it is held invalid shall not be affected thereby.